ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

NOV 23 1993

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Dkt No. 94-
Commission's Rules to	)	
Make Wireline Telephone	)	
Common Carriers Eligible	)	
for Licensing in the Specialized	)	
Mobile Radio Services	)	

To: The Commission

PETITION FOR RULE MAKING

Polar Communications Mutual Aid Corporation ("Polar"), pursuant to Rule Section 1.401, and by its attorneys, respectfully requests that Rule Section 90.603(c) be amended to eliminate the prohibition against wireline telephone companies from holding licenses in the Specialized Mobile Radio ("SMR") Services.

Polar is an interested party, within the meaning of Rule Section 1.401(a), since Polar is a wireline telephone common carrier serving portions of North Dakota. Grant of the relief requested in this Petition would allow Polar to provide SMR service in and around its telephone service area without undue regulatory restraint.

I. PROCEDURAL HISTORY

When the Commission established SMR service in 1974, it prohibited wireline eligibility for SMR licensing. Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974).

The Commission has reconstructed the bases for this prohibition as: (1) preserving the historical distinction between private and common carrier services; (2) protecting

the interest in unambiguously labeling SMR providers as private carriers, and therefore, not subject to state entry and rate regulation; and (3) alleviating competitive concerns, such as ensuring that SMR licenses are available as opportunities to entrepreneurs, and prevention of discriminatory interconnection practices by wireline common carriers. Order, PR Docket No. 86-3, 7 FCC Rcd. 4398 (1992).

In 1986, the Commission opened Private Radio Docket No. 86-3 to consider eliminating the prohibition. Notice, 51 Fed. Reg. 2910 (1986). The basis for this proposal was that there was no longer any reason to prohibit wireline common carriers from entering the SMR market, since SMR had become a robust and competitive industry. Id. However, last year, after approximately six years, the Commission terminated the docket, citing a desire to "preserve a climate more favorable to the continued development of private land mobile operators." Order, PR Docket No. 86-3, 7 FCC Rcd. 4398, 4399 (1992).

II. WIRELINE PARTICIPATION IN THE SMR INDUSTRY WOULD SERVE THE PUBLIC INTEREST

In many parts of the United States, including the remote portions of North Dakota served by Polar, the local exchange carrier (LEC) is one of the few business concerns with an interest in providing SMR service. In many rural areas, the LEC would be the only SMR provider, and in other rural areas, the LEC would provide the only competition to the lone entrenched SMR provider. Therefore, allowing wireline

licensing would stimulate competition in the SMR industry in rural areas.

The Commission has found that the public interest is furthered by actively encouraging the SMR industry's healthy growth. Allowing wirelines to provide SMR service to rural areas that otherwise would not have active service providers (or consumer choices between SMR service providers) would further the public interest in stimulating widespread provision of SMR service.

Moreover, in metropolitan areas, where there are waiting lists for SMR frequencies, and there already is abundant SMR competition, the addition of wirelines would further enhance the industry by bringing innovation, and more capital.

III. THE PROHIBITION'S BASES ARE MOOTED, OR NOW ARE BEING ADDRESSED

Each of the above three stated bases for prohibiting wireline eligibility for SMR licensing already has been made obsolete, or shortly will be addressed by the Commission.

A. Regulatory Parity Will Resolve Carrier Distinctions

The Commission soon will reclassify some or all SMR services into commercial mobile services in General Docket No. 93-252 (Regulatory Treatment of Mobile Services). Those SMR services that will be regulated as commercial, will automatically become common carrier services. 47 U.S.C. § 332(c)(1)(A) (1993). A need would no longer exist to maintain the "historical distinction between private and common carrier services," since the SMR service in question

would be common carrier, like the wireline carrier. Therefore, continuation of a prohibition against wireline licensing for common carrier SMR service would serve no useful purpose.

Even if SMR dispatch is classified as a private service, the Commission has already announced its intention to consider common carrier provision of dispatch, as it relates to mobile services common carriers. Notice of Proposed Rule Making, GN Dkt No. 93-252, FCC Mimeo No. 93-454 (NPRM), para. 42. If the Commission intends to "create a comprehensive framework for the regulation of mobile radio service" (NPRM at para. 1), it is only logical that wireline provision of dispatch, and other SMR services, likewise must be reconsidered. By reconsidering wireline provision of SMR, along with potential common carrier mobile provision of SMR, the Commission can treat the related issues comprehensively.

Moreover, the Communications Act makes clear that an entity providing a private mobile service would not be treated as a common carrier to the extent that it provides that private service. 47 U.S.C. § 332(c)(2) (1993). Therefore, even if SMR dispatch were to remain a private service, common carrier wirelines could provide dispatch service without danger of SMR dispatch losing its private status. This would appear to indicate Congressional intent to abolish the former presumption that only private carriers should provide private service.

B. State Regulation Is Defined By Statute

The second rationale for the wireline ban, avoiding state regulation of SMRs, is likewise moot. In passing the Omnibus Budget Reconciliation Act of 1993, Congress has moved to create a more level playing field between common and private carriers. To further this goal, Congress preempted state entry and rate regulation.

Specifically, states are absolutely preempted from imposing any entry or rate regulation on private mobile service. 47 U.S.C. § 332(3)(A) (1993). Therefore, SMR service found to be private in GN Dkt No. 93-252 is absolutely immune from state entry and rate regulation, regardless of whether wirelines provide the private SMR service. Additionally, states are preempted from imposing on commercial SMR (as determined in GN Dkt No. 93-252), any entry regulation, and some or all rate regulation, depending upon state petitions and FCC action. Id. Preemption of state entry regulation and FCC allowance (or preemption) of state rate regulation would apply regardless of whether wirelines provide commercial SMR service. Therefore, prohibiting wirelines from SMR licensing no longer serves the purpose of preventing state regulation.

C. Competitive Issues Are Mooted, or Will Be Resolved

Third, the twin competitive issues of preserving SMR small business opportunities, and preventing anticompetitive

wireline interconnection are mooted, or now are under consideration by the Commission.

Preserving small business opportunities for SMR entrepreneurs no longer appears to be practicable, since the Commission's goal of encouraging a vibrant SMR industry has succeeded, perhaps beyond original expectation. What once was a fledgling SMR industry providing numerous opportunities for entrepreneurs, has become "big business," increasingly dominated by large companies and consolidated networks. The Commission accurately anticipated the current wave of SMR mergers and consolidation by proposing to license wide-area or "big SMR" operations in the 800 MHz band (PR Dkt No. 93-144) and 900 MHz band (PR Dkt No. 89-553). If implemented, these proposals would have the effect of accelerating the present trend toward concentration in the SMR industry. Therefore, prohibiting wirelines from entering SMR no longer serves the useful purpose of preserving small business opportunities for entrepreneurs.

Moreover, prohibiting wirelines from licensing in SMR contradicts the Commission's goal of encouraging development of small businesses. The overwhelming majority of companies shut out of SMR by the wireline restriction are small rural telephone companies, such as Polar, with capitalizations just a fraction of the size of Nextel or other dominant SMR operators. Retaining this unnecessary prohibition actually restrains small business, rather than protecting it.

Finally, interconnection rights should be established in GN Dkt No. 93-252 for commercial SMR services (NPRM at para. 71), and any private SMR services (NPRM at para. 72). All interconnection to the public switched telephone network would be regulated by the Commission, since it proposes preempting from state regulation local exchange carrier (LEC) provision of both interstate and intrastate interconnection. (NPRM at para. 71). Under rules to be established in GN Dkt No. 93-252 (and under current rules), a wireline common carrier providing SMR service would be required to extend interconnection to any SMR competitors on the same terms and conditions as extended to its own SMR service. Therefore, prohibiting wireline licensing in the SMR services would no longer serve the purpose of preventing discriminatory interconnection practices.

The Commission successfully resolved the much more contentious interconnection issues for cellular carriers some time ago, without prohibiting wireline participation in the industry. Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd. 2369 (1989), affirming Declaratory Ruling, 2 FCC Rcd. 2910 (1987) ("Cellular Interconnection Proceeding"). Cellular carriers successfully interconnect with the very wireline carriers that compete with them for cellular customers.

There is no reason why the Commission cannot establish non-structural safeguards for SMR interconnection, similar to

those established for cellular and the other common carrier mobile services. For example, wirelines already are required to negotiate in good faith with cellular carriers, and other radio common carriers. 4 FCC Rcd. at 2370. The Commission retains jurisdiction over these good faith negotiations. 4 FCC Rcd. at 2371. In the Cellular Interconnection Proceeding, the Commission established bench marks for the level of interconnection (Type 2 or Type 1), and the timing within which interconnection must be provided. The Commission also required that interconnection must be cost based. 2 FCC Rcd. 2910. In short, the Commission has already successfully resolved the interconnection issues that would arise in wireline provision of SMR.

The Commission recently revisited this issue, and ruled that local exchange carriers (LECs) are eligible to provide personal communications service (PCS). Second Report and Order, GEN Dkt No. 90-314, FCC Mimeo No. 93-451, released October 22, 1993. In the PCS proceeding, the Commission had considered whether LECs possibly would discriminate against PCS competitors requesting interconnection, or possibly would cross-subsidize PCS expenditures from rate-regulated operations. FCC Mimeo No. 93-451 at pp. 48-53. A large number of comments were considered, most of which supported LEC provision of PCS in some form. Id. The Commission found that there are economies of scope that would not be realized if LECs were prohibited from providing PCS within their

wireline service area. Id. Subject to cellular ownership eligibility requirements, LECs, including the Bell Operating Companies, are eligible to provide PCS without any separate subsidiary requirements. Id. As with cellular interconnection, the Commission already has decided the key issues in PCS that would arise in wireline provision of SMR. Again, the Commission found it unnecessary to impose a line-of-business restriction.

There is no rational basis on which to distinguish the prohibition against wireline provision of SMR, from LEC eligibility to provide cellular service, and PCS. In light of the Commission's goal of making enhanced SMR a direct competitor to cellular and PCS, it would be arbitrary to retain an outmoded restriction on wireline provision of SMR.

WHEREFORE, pursuant to Rule Section 1.407, Polar Communications respectfully requests that a Notice of Proposed Rule Making be announced to solicit comments on eliminating the prohibition against wireline licensing in the SMR services. Polar further requests that the words "except wireline telephone common carriers" be stricken from Rule Section 90.603(c), 47 C.F.R. 90.603(c).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Julian P. Gehman, attorney in the law office of Blooston, Mordkofsky, Jackson & Dickens, hereby certify that on this 23rd day of November, 1993, I have caused to be hand-delivered and federal expressed a copy of the foregoing Petition for Rule Making to the following:

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